BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ADRIANA HERNANDEZ Claimant	)	
VS.	)	
HILTON GARDEN INN Respondent	)	Docket No. 1,038,356
AND	)	
ZURICH AMERICAN INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the March 13, 2012, Award entered by Administrative Law Judge Thomas Klein. The Board heard oral argument on June 15, 2012. Alexander B. Mitchell, II, of Wichita, Kansas, appeared for claimant. Wade A. Dorothy, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found claimant met with personal injury by accident on September 1, 2007, that arose out of and in the course of her employment. The ALJ found claimant suffered a 10 percent impairment to the body as a whole but ruled claimant was not entitled to an award of work disability "as a result of the claimant's work status."[1]

The Board has considered the record and adopted the stipulations listed in the Award, except for stipulations Nos. 1 and 2, which should be shown as allegations, not as stipulations. Claimant alleged she met with personal injury by accident in Sedgwick County, Kansas, on September 1, 2007. Respondent denied those allegations.[2]

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[1] ALJ Award (Mar. 13, 2012) at 3.

[2] R.H. Trans. at 4-5.

ISSUES

Claimant requests review of the ALJ's finding that she was not entitled to a work disability. She argues she is entitled to a 91.75 percent work disability based on a 100 percent wage loss and a task loss of 83.5 percent, the average of the task loss opinions of Drs. Fluter and Murati.

Respondent argues that claimant failed to prove she suffered personal injury by accident that arose out of and in the course of her employment on the date alleged. In the alternative, respondent contends claimant cannot be compensated for work disability and any award should be limited to her functional impairment.

The issues for the Board's review are:

(1) Did claimant meet with personal injury by accident that arose out of and in the course of her employment on September 1, 2007?

(2) What is the nature and extent of claimant's impairment of function?

(3) Is claimant entitled to a work disability even though she cannot legally work in the U.S.? If so, what is the nature and extent of her work disability?

FINDINGS OF FACT

Claimant was 43 years old at the time of the regular hearing. She was born in Mexico, where she went to school until the sixth grade. She has had no additional education or special training. She moved to Kansas in 1991. Currently she is not a citizen of the United States, but she is not in the United States illegally. Claimant applied for residency in 1997. Claimant testified she has a letter from "Immigration" (currently United States Citizenship and Immigration Services) that says she has been accepted to be in the United States as long as she does not leave the country.[3] She does not have a valid Social Security number. Claimant said that while her application for permanent residency is pending, she cannot legally work in the United States.

Claimant began working for respondent in May 2001 as a housekeeper. Her job involved changing beds, turning mattresses, mopping, sweeping, cleaning bathrooms, and emptying trash. Claimant testified that on September 1, 2007, she started having a horrible pain in her neck and hand while at work. She went to her personal physician, Dr. Antonio Osio, on September 5, 2007, with complaints of pain that radiated into her back. He diagnosed her with acute cervical strain with neuropathies or inflammation of the nerves to the left. Claimant said the pain did not go away, so she returned to Dr. Osio, who told

[3] R.H. Trans. at 11.

her to report the condition to her employer as it was work related. Claimant reported the injury to her supervisor and continued to work until December 2007, when she was terminated because she was "illegal."[4] She has not worked since, nor has she attempted to find another job. At the regular hearing, claimant testified at times her hand goes numb and she feels pain in her back, neck, left shoulder, hand[5], jaw, and legs.

Dr. Osio testified that claimant has been his patient since 2002. He said about March 2003, claimant complained of recurrent and persistent neck pain. She further complained of left-sided neck pain in January 2004. Dr. Osio's record of March 21, 2005, mentions claimant's neck in context with headaches. Dr. Osio found that claimant's headaches were associated with her emotional status, and she received treatment. On March 24, 2006, claimant complained to Dr. Osio that she had awakened that morning with left shoulder and neck pain, saying she slept on her shoulder wrong. Dr. Osio, on examining claimant, found she had limited range of motion because of pain. He diagnosed her with a spasm in the left cervical spine with pain radiating from her neck to the shoulder. Claimant was given a muscle relaxant and anti-inflammatory medication and was told to use heat on her neck.

Dr. Osio saw claimant on September 5, 2007, for pain in her left arm that radiated to her back. He examined claimant and diagnosed her with an acute cervical strain with neuropathies or inflammation of the nerves to the left. Claimant returned on September 10, 2007, complaining of pain in her left arm that was getting worse. Dr. Osio did not remember that claimant made any mention of why she was feeling the pain. They did not discuss causation. Dr. Osio suspected claimant had a cervical problem because there seemed to be a reduction in the disc space in the x-rays of her neck. He referred her to Dr. B. Theo Mellion, a neurosurgeon. In a letter to Dr. Osio dated September 27, 2007, Dr. Mellion said claimant reported she was in her usual state of health until September 3, 2007, when she had a sudden onset of neck pain radiating into her left shoulder and arm with numbness and tingling into the forearm and hand. An MRI[6] of claimant's cervical spine showed she had disc degeneration, a broad-based disc bulge, and spondylitic changes at C5-6 as well as disc degeneration, disc space collapse, and a left paracentral disc herniation at C6-7. Dr. Mellion suspected claimant was symptomatic from her cervical disc disease and spondylosis.

In October 2007, Dr. Osio wrote a TO WHOM IT MAY CONCERN letter indicating there was a good possibility claimant's condition was work related, but he would defer that decision to physicians who were specialists. The letter set out some of claimant's preexisting medical problems. Dr. Osio could not remember why that letter was generated.

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[4] R.H. Trans. at 10.

[5] Sometimes claimant complained of pain in her hand and other times she used the plural hands.

[6] The MRI was conducted on September 14, 2007. It is unknown who ordered the MRI.

Dr. Sandra Barrett, a board certified physiatrist, saw claimant on December 24, 2008, as part of an independent medical evaluation ordered by the ALJ. Claimant's chief complaint was neck and left shoulder pain. Claimant gave Dr. Barrett an injury date of September 1, 2007, but said the pain had been gradually increasing over a 10-month period before that date. Claimant denied any previous neck pain or neck symptoms. Claimant said she worked in respondent's housekeeping department but did not give a particular event that gave rise to any acute symptoms.

Dr. Barrett reviewed the MRI taken September 14, 2007, which showed claimant had degenerative disc disease from C4-5, C5-6 and C6-7. There were significant findings at C6-7 with a left disc herniation causing some stenosis. Dr. Barrett examined claimant, after which she diagnosed her with multilevel cervical degenerative disc disease and left disc herniation at C6-7. Dr. Barrett recommended an EMG be obtained and suggested physical therapy and some medication.

Concerning causation, Dr. Barrett said:

> Based on the available information and to a reasonable degree of medical probability, the multi-level cervical degenerative disc disease is most likely pre-existing the reported injury on or about 09/01/07 and most likely represents an exacerbation from pre-existing condition. I cannot make a definitive correlation between the said injury date of 09/01/07 and the left-sided disc herniation.[7]

Dr. Barrett next saw claimant on March 12, 2010. Claimant had undergone an EMG and nerve conduction study, which was normal. Claimant was referred to physical therapy and started on medication. Dr. Barrett placed claimant in the light duty category with temporary lifting restrictions of 0 to 10 pounds frequently and 0-20 pounds occasionally. Claimant was also only occasionally to push, pull, twist or turn.

Dr. Barrett last saw claimant on May 7, 2010. Claimant had undergone some physical therapy and said she had an increase in movement of the neck but the pain had not changed. Dr. Barrett recommended two epidural injections and then follow up. She left claimant's work status the same. Dr. Barrett said claimant did not return after the May 7, 2010, visit. Dr. Barrett said claimant's symptoms of pain radiating into her left arm, shoulder and neck could be related to either her preexisting degenerative disc disease, her herniated disc, or both.

Since Dr. Barrett's restrictions were temporary, and because claimant was in ongoing treatment the last time Dr. Barrett saw her, she did not place any permanent restrictions on claimant. Dr. Barrett would give no opinion on whether the exacerbation or aggravation of claimant's prior degenerative disc disease was temporary or permanent.

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[7] Barrett Depo., Ex. 2 at 8.

As of May 7, 2010, Dr. Barrett was still unable to causally relate claimant's disc herniation to her employment. Dr. Barrett said it would be hard for anyone to make a correlation between a work related injury and claimant's disc herniation unless claimant had an MRI before having her current symptoms.

Dr. Paul Stein, a board certified neurological surgeon, conducted an examination of claimant on December 10, 2007, at the request of respondent. Claimant's chief complaint at that time was neck and left upper extremity pain. She had no pain into the left anterior chest and up to the neck. She had numbness and tingling in the first, second and third fingers of the left hand. Claimant told Dr. Stein she had no previous history of neck or left upper extremity symptoms, nor had she sustained any previous trauma. Claimant said she felt some pain in her left shoulder and arm area prior to September 2007 with no specific injury or accident. Claimant told Dr. Stein she woke up one morning with severe pain extending into her left upper extremity and the next day she went to her primary physician, Dr. Osio

Dr. Stein reviewed Dr. Osio's letter of October 12, 2007, that noted claimant had recurrent and persistent neck pain sometime around March 2003. He reviewed claimant's MRI scan dated September 14, 2007, which showed mild degenerative changes at C5-6 and a left-sided disc herniation at C6-7. Dr. Stein performed a physical examination of claimant, after which he diagnosed her with a disc herniation on the left at C6-7 which irritated a nerve, causing her complaints of severe left arm pain. Dr. Stein opined that he could not, within a reasonable degree of medical probability or certainty, make a causal relationship between claimant's work activities and the disc herniation given the history and information he had available.

Dr. Stein examined claimant a second time on December 21, 2010, again at the request of respondent. Claimant had been treated by Dr. Barrett but had not improved, stating she was much worse now than in 2007. After examining claimant, Dr. Stein said he had no definitive changes in his findings and there was no change in his opinion regarding claimant's diagnosis. He also did not change his opinion regarding the causal relationship between her working and her disc herniation. Dr. Stein noted he found some symptom magnification in his examination of claimant on December 21, 2010.

Dr. Stein testified that in relation to claimant's work activity, he found she would have no impairment because he did not find a causal relationship between claimant's pathology, her symptoms and her work activities. Dr. Stein said any impairment claimant may have is related to a natural disorder, meaning that discs herniate all the time without trauma of any sort.

Dr. Stein did not know if he and claimant discussed her physical activities at work but said he had a fair understanding of what housekeeping activities at a hotel involve. He acknowledged that lifting a mattress is a type of activity that might herniate a disc. However, Dr. Stein said claimant did not describe to him an event of lifting mattresses

causing her acute problems. To the contrary, claimant reported to him that she had no specific injury or accident.

Dr. Stein did not give claimant any work restrictions. He said claimant was not working when he saw her the first time, and he was not asked to provide work restrictions in his second examination.

Dr. George Fluter is board certified in physical medicine and rehabilitation and in internal medicine and is a certified independent medical examiner. He conducted an evaluation of claimant on August 27, 2008, at the request of claimant's attorney. Claimant told him she had been working as a housekeeper for respondent for 6 1/2 years and woke up one day in September 2007 with pain affecting her neck, left shoulder and left arm. Dr. Fluter reviewed the MRI scan as well as medical records from Drs. Osio, Mellion and Stein.[8]

Claimant told Dr. Fluter that she had some "hard pain" affecting her left upper extremity about 10 months before her current condition. Dr. Fluter was not sure what claimant meant when saying she had "hard pain."[9]

Claimant told Dr. Fluter she was having pain affecting the neck and upper back as well as the left upper chest, left shoulder girdle, left arm and right arm. The pain was constant but was worse at night. After examining claimant, Dr. Fluter diagnosed her with neck and upper back pain and bilateral upper extremity pain with the left affected more than the right. She had multilevel cervical discopathy. An MRI showed claimant had end plate changes at the C5-6 level and mild narrowing of the discs from the C3-4 level through the C6-7 level. She had disc osteophyte complex at the C4-5 and C5-6 levels. She had a disc herniation at the C6-7 level.

Dr. Fluter opined that based on the sum total of the information he had, there was a contributory relationship between claimant's condition and the work activities she had been performing. Dr. Fluter believed there had been an aggravation, and her conditions were rendered symptomatic by her work activities.

Dr. Fluter imposed restrictions limiting claimant's lifting, carrying, pushing and pulling to 20 pounds occasionally and 10 pounds frequently. Overhead activities should be restricted to an occasional basis, and claimant should avoid holding her head and neck in awkward or extreme positions. Repetitive grasping with each hand; repetitive flexion and extension of each wrist; and movements of the elbow–flexion, extension, pronation, supination–should be restricted to an occasional basis. Dr. Fluter reviewed the task list

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[8] Dr. Fluter did not have any of Dr. Osio's medical records before December 12, 2006.

[9] Fluter Depo. at 13.

prepared by Mr. Hardin. Dr. Fluter said that of the 21 nonduplicative tasks on the list, claimant was unable to perform 17 for an 81 percent task loss.

Dr. Fluter recommended claimant have further treatment by way of anti-inflammatory medication, muscle relaxant and analgesic medication. He thought anti-depressants and anti-convulsants should be considered. He believed she should have electrodiagnostic testing, a nerve conduction/EMG test to determine if radiculopathy is present. He thought claimant should have a course of physical therapy and, depending on how she did, epidural injections or nerve root blocks. If after treatment she was still experiencing symptoms, she should be reevaluated by a neurosurgeon.

Dr. Pedro Murati is board certified in electrodiagnostic medicine and physical medicine and rehabilitation, and is a certified independent medical examiner. At the request of claimant's attorney, he evaluated claimant on November 17, 2010. Claimant gave Dr. Murati a description of her job. She gave a history of being injured due to lifting mattresses on a daily basis while changing sheets. An MRI performed on September 14, 2007, showed degenerative disc disease at C6-7 with a disc herniation. Claimant denied any significant previous injuries to her shoulder or neck previous to the work related injury. Dr. Murati acknowledged he had not received or reviewed any medical records from Dr. Osio prepared before September 2007.

After examining claimant, Dr. Murati diagnosed her with neck pain with signs and symptoms of radiculopathy and left carpal tunnel syndrome. His findings were consistent with the work activities claimant described. Dr. Murati was of the opinion that claimant's lifting of mattresses at respondent caused the herniation in her disc. He believed claimant's left carpal tunnel syndrome was caused by her work activities at respondent.

Dr. Murati imposed restrictions on claimant of no climbing ladders; crawling; heavy grasping with the left hand; above-shoulder level work with both arms; lifting, carrying, pushing or pulling greater than 20 pounds, and then only occasionally. She should work no more than 18 inches away from the body with both arms, avoid awkward positions of the neck, and use wrist splints while working and at home on the left. She should not use hooks, knives or vibratory tools on the left. She should only occasionally repetitively grab, grasp on the left and frequently hand controls on the left. She could lift, carry, push and pull frequently to 10 pounds. Dr. Murati reviewed Mr. Hardin's task loss and opined that claimant had an 86 percent task loss. Dr. Murati did not adjust his task loss opinion for unduplicated tasks. If one deletes the duplicated tasks, Dr. Murati's opinion would be that claimant was not able to perform 17 of the 21 nonduplicated tasks for an 81 percent task loss.

Using the AMA *Guides*,[10] Dr. Murati rated claimant as having a 10 percent upper extremity impairment for her mild carpal tunnel syndrome, which converts to a 6 percent whole person. For claimant's neck, Dr. Murati found she was in DRE cervicothoracic Category II for a 15 percent whole person impairment. These impairment ratings combine for a 20 percent permanent partial impairment to the whole body.

Dr. Pat Do, a board certified orthopedic surgeon, performed an independent medical examination of claimant on March 17, 2011, at the request of the ALJ. Claimant told Dr. Do she had a series of work injuries from September 1, 2007, through December 17, 2007. She described her job as sweeping, vacuuming, washing and bending over in a tub. Claimant said that on a day in early September 2007, after washing a lot of tubs and bending over, she came home in the afternoon with excruciating neck pain and that night she could not sleep at all. Claimant complained of neck pain and left arm pain.

After examining claimant, Dr. Do diagnosed claimant with C4-5, C5-6 degenerative disc disease and C6-7 disc herniation. Dr. Do opined that claimant's working as a housekeeper at least aggravated, accelerated and made active some of her symptoms. Dr. Do said he relied on a patient's oral history "a lot" in forming a causation opinion.[11]

Based on the AMA *Guides*, Dr. Do rated claimant as having a 10 percent whole person impairment. He imposed permanent restrictions that claimant limit overhead lifting above her shoulder level to no more than 25 pounds, from floor to shoulder level of no more than 50 pounds.

Jerry Hardin, a personnel and human resource consultant, met with claimant, her husband and an interpreter on January 3, 2011. Mr. Hardin said he had claimant fill out a task performance capacity assessment sheet for each job she held for 15 years before her injury. Claimant's husband filled that out for her from information she gave him. Both claimant's husband and the interpreter spoke English, so Mr. Hardin was able to get all the information he needed to complete the job task lists.

Mr. Hardin concluded that claimant is not employable as related to the restrictions given by Drs. Murati and Fluter. Because claimant does not read, write, speak or understand English; has a very limited education; has no transferable skills; and the employment situation in Wichita, she cannot do the jobs she did before. It is Mr. Hardin's opinion that it would be impossible for her to go out and find a job. Mr. Hardin did not have any discussion with claimant about her immigration status.

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[10] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[11] Do Depo. at 8.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[12] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[13]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[14]

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged

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[12] K.S.A. 2007 Supp. 44-501(a).

[13] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[14] *Id.* at 278.

> together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[15] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[16] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[17]

In *Fernandez*,[18] the Board stated:

> The ALJ denied claimant a work disability under K.S.A. 44-510e due to claimant's illegal alien status. The ALJ ruled that, as a matter of public policy, a worker illegally in the United States cannot attempt to adhere to the purpose of the Act as the worker cannot legally obtain a job in this country. The ALJ held that this "public policy" is not abrogated by *Bergstrom [v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009)].
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> In *Bergstrom*, the Kansas Supreme Court said that the fact finder should follow and apply the plain language of the statute. K.S.A. 44-510e provides that once an injured worker is no longer earning 90 percent or more of her pre-injury average weekly wage, then the measure of disability is the percentage of task loss averaged with the percentage of wage loss. And the wage loss is determined by comparing the pre-injury average weekly wage with the actual post-injury earnings, if any. The Court, in *Bergstrom*, further held that K.S.A. 44-510e contains no

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[15] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[16] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[17] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[18] *Fernandez v. McDonald's*, Docket No. 1,036,799, 2010 WL 3489639 (Kan. WCAB Aug. 25, 2010). This matter is currently pending before the Kansas Supreme Court, Case No.104,951.

requirement that an injured worker make a good-faith effort to seek post-injury employment to mitigate the employer's liability, citing and disapproving *Foulk* [*v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995)] and *Copeland* [*v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997)] and all subsequent cases that have imposed a good-faith effort requirement on injured workers.[19] The Court further noted that it had consistently elected to refrain from reading language into the statutes that the legislature did not include.[20]

Here, the determination by the ALJ that public policy prohibits a work disability award to an illegal alien is not founded in statutory language. "Judicial blacksmithing will be rejected even if such judicial interpretations have been judicially implied to further the perceived legislative intent."[21] Based on the rules of statutory construction set forth in *Bergstrom*, the Board finds that claimant is entitled to a work disability under K.S.A. 44-510e.

ANALYSIS

When claimant initially filed this claim, she alleged a series of accidents (repetitive traumas) beginning "09/01/07 and each and every working day thereafter" from performing her "[n]ormal job duties."[22] It is interesting to note that the Application for Hearing did not mention a cervical spine or neck injury. Instead, it alleged injuries to claimant's "[b]ilateral upper extremities and shoulders."[23] At the regular hearing, however, the claim was amended to allege a single accident date of September 1, 2007.[24] Claimant's testimony was only partially consistent with this amended claim.

Q. [by claimant's attorney] What happened to you on September 1, 2007?
A. [by claimant] I started having pain with my neck and my hand, not asleep, like a horrible pain.
Q. What had you been doing?
A. When I was doing my job at the hotel, it had been some time now when I had felt the pain.[25]

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[19] *Bergstrom* at 610.

[20] *Id*. at 609.

[21] *Tyler v. Goodyear Tire & Rubber Company*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

[22] Form K-WC E-1, Application for Hearing filed January 18, 2008.

[23] *Id.*

[24] R.H. Trans. at 4.

[25] *Id.* at 9.

Claimant first said her pain started on September 1, 2007. But she also indicated that her pain had been ongoing for "some time," although it is not clear from the questions and her answers whether she was referring to "some time" before or after September 1, 2007, or both. Nevertheless, despite Dr. Osio's records to the contrary, claimant specifically denied ever reporting neck complaints to Dr. Osio before September 2007. She did admit to having prior symptoms in her hand and arm, as well as having dizzy spells and vertigo.[26] This testimony later changed to upper back and shoulder symptoms, not the hand and arm, until sometime after September 1, 2007.[27]

Dr. Osio described claimant as having "recurrent and persistent neck pain" since March 2003.[28] And although claimant said she reported her injury to her employer because Dr. Osio told her that her condition was work-related, in his deposition Dr. Osio said that was a possibility but he would defer to the specialists as to the cause of claimant's conditions. When Dr. Osio saw claimant on September 5 and September 10, 2007, she reported a pain radiating into her left shoulder and arm, but she did not say how or why. Dr. Mellion was given a history of a sudden onset of neck pain radiating into the left shoulder and arm on September 3, 2007. He attributed claimant's symptoms to cervical disc disease and spondylosis. He offered no opinion concerning the cause of the conditions he diagnosed, only treatment options.

Dr. Barrett, the court-ordered independent medical examination physician, was given an injury date of September 1, 2007, but claimant said her symptoms had been gradually increasing over a 10-month period before that date. Claimant did not describe there having been an accident or any specific event at work that caused her symptoms to either begin or worsen. She related her symptoms to "daily activity."[29] Dr. Barrett could not correlate claimant's disc herniation to an injury on September 1, 2007. And although Dr. Barrett said some of claimant's symptoms likely were due to an aggravation of preexisting degenerative disc disease, she did not say the aggravation was due to claimant's work activities with respondent.

Claimant also told Dr. Stein that she had no specific accident or injury. Claimant related an onset of symptoms sometime prior to September 2007 but with no particular cause. However, she said that one morning in September 2007, she awoke with severe pain in her neck extending into the left upper extremity. She reported this as having occurred at home, not at work. Dr. Stein said he could not make a causal relationship

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[26] *Id.* at 16.

[27] *Id.* at 17-18.

[28] Osio Depo., Ex. 1.

[29] Barrett Depo., Ex. 5 at 1.

between claimant's work activity and the disc herniation to a reasonable degree of medical probability. In fact, Sr. Stein said he "didn't believe that there was evidence that this was a work injury."[30]

The history claimant gave Dr. Fluter was also of having pain in her left upper extremity for 10 months prior to September 2007. She denied having any problems with her neck or upper extremities before that. And although Dr. Fluter says he was given a history of a work-related injury on or about September 1, 2007, what claimant actually described was awaking "with pain affecting the neck, left shoulder, and left arm."[31] Nevertheless, Dr. Fluter gives an opinion "to a reasonable degree of medical probability, [that] there is a causal/contributory relationship between [claimant's] current condition and the reported injury on or about 09/01/07 and its sequelae."[32] This causation opinion lacks credibility. First, claimant did not give Dr. Fluter a description of an accident or injury at work. She gave a description of awaking with pain at home. Second, Dr. Fluter says claimant's preexisting condition was aggravated and rendered symptomatic by repetitive work activities. Claimant is not alleging a series of repetitive traumas. She is alleging a single September 1, 2007, date of accident.

Furthermore, Dr. Osio's records show claimant had the same or similar symptoms in 2003 and 2006. Nowhere is there a record of a contemporaneous mention of a work component to those symptoms or, for that matter, of an incident, accident or injury on September 1, 2007.

Claimant was examined by Dr. Murati on November 17, 2010. For the first time, claimant gave a history of being "injured due to lifting mattresses on a daily basis while changing sheets."[33] Dr. Murati's independent medical examination report also lists a date of injury of September 3, 2007, and that "claimant denies any previous injury to her shoulder prior to his [*sic*] work-related injury that was sustained on 09-03-2007."[34] In his deposition testimony, Dr. Murati clarified that this included the neck, that is that claimant denied previous injury to her shoulder and to her neck. Finally, Dr. Murati concludes: "This patient's current diagnoses are within all reasonable medical probability a direct result from the work-related injury that occurred on 09-03-2007, during her employment with Hilton

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[30] Stein Depo. at 15-16.

[31] Fluter Depo., Ex. 2 at 1.

[32] *Id.* at 4.

[33] Murati Depo., Ex. 1 at 1.

[34] *Id.* at 2.

Garden Inn."[35] This opinion lacks credibility and relevance because there is no allegation of an injury on September 3, 2007, and because Dr. Murati had an incomplete history of claimant's preexisting neck, back and upper extremity complaints. Dr. Murati also diagnosed claimant with carpal tunnel syndrome on the left, which he attributed to the neck injury because of "double crush syndrome."[36] Compensability of the carpal tunnel syndrome condition is therefore tied to the compensability of the neck condition.

The last physician to examine claimant was Dr. Do. He saw claimant for a court-appointed independent medical examination on March 17, 2011. Dr. Do was given a history by claimant of a series of work aggravations or injuries from a series of accidents from September 1, 2007, through December 17, 2007. As stated above, claimant is not making a claim for a series of accidents. Nevertheless, claimant also described to Dr. Do a particular instance in early September 2007 where "after washing a lot of tubs that day and bending over, she came home in the afternoon [and] had excruciating neck pain and that night she stated she could not sleep at all."[37] No other physician was given this history and claimant never testified to this. Dr. Do's causation opinion is flawed due to his having relied upon this flawed history.

Claimant has described differing histories and relates her symptoms to different events with virtually every physician she saw. As stated, the only physicians to express causation opinions favorable to claimant do so based upon misinformation and/or incomplete information. This record fails to prove a work injury occurred on September 1, 2007.

CONCLUSION

Claimant has failed to satisfy her burden of proving she met with personal injury by accident arising out of and in the course of her employment with respondent on September 1, 2007.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award entered by Administrative Law Judge Thomas Klein dated March 13, 2012, is reversed.

IT IS SO ORDERED.

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[35] *Id.* at 3.

[36] Murati Depo. at 9.

[37] Do. Depo., Ex. 2 at 1.

Dated this _____ day of July, 2012.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Alexander B. Mitchell, II, Attorney for Claimant
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Thomas Klein, Administrative Law Judge